NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

City Stationery, Inc. *and* Unión De Tronquistas De Puerto Rico, Local 901, IBT, AFL–CIO. Cases 24–CA–9070 and 24–RC–8213

September 30, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On June 17, 2002, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified below and to adopt the recommended Order as modified.[2]

On October 19 and 22, 2001,[3] the Respondent discharged 20 warehouse employees for seeking to discuss possible wage increases with its president. The judge found that the discharges violated Section 8(a)(1) and, except for a few employees who had already been reinstated or who had waived reinstatement and backpay pursuant to settlement agreements, ordered the discriminatees reinstated with backpay. He also ordered that the challenged ballots cast by all of the discriminatees in a Board-conducted representation election be opened and counted.

The Respondent has excepted to the judge's findings of violations with regard to only two employees, Luis Muler and Eddiel Cruz. It also argues, contrary to the judge, that the ballots of Baltasar García and Héctor Franco should not be counted because they waived their right to have their votes counted by signing settlement agreements. Finally, the Respondent contends that the Board should conduct a hearing to determine whether the Union's showing of interest was sufficient to support its representation petition. For the reasons discussed below, we find no merit in these contentions.[4]

The Discharges of Muler and Cruz

On Friday, October 19, a group of 17 of the Respondent's warehouse employees attempted to discuss wage increases with the Respondent's president, Pedro Rodríguez. Rodríguez ordered them to get back to work or to leave the Respondent's property. When the employees left and congregated at the facility's gate, Rodríguez discharged them, ostensibly for "work abandonment." The employees stood outside the facility's gate for the remainder of October 19 and throughout the following week, in protest of the Respondent's conduct toward them. The judge found that the discharges of these 17 employees because of their protected concerted activities were unlawful, and the Respondent has not excepted to that finding.

Muler, Cruz, and a coworker, Héctor Franco, were absent from work on October 19.[5] On Monday, October 22, they joined the demonstrators at the facility's gate. As the judge found, both Rodríguez and the Respondent's attorney, Agustín Gómez, came to the gate that morning; Rodríguez "looked fixedly" at the employees standing there, and Gómez spoke to them. Muler, Cruz, and Franco were discharged that day.

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), a discharge that is alleged to have been motivated by employees' protected conduct is subject to a two-step test. First, the General Counsel must establish that animus against the employees' protected conduct was a motivating factor in the employer's discharge decision. If that showing is made, the Board will find the violation unless the employer

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's remedy to require the Respondent to remove from its files all references to all of the unlawful discharges and to notify all of the discriminatees in writing that it has done so and that the discharges will not be used against them in any way. We shall also add a make-whole provision to the Order, which the judge inadvertently omitted, and conform the language of the notice to that of the Order.

[3] All dates are in 2001 unless otherwise indicated.

[4] We do agree with the Respondent that the judge erred in awarding reinstatement and backpay to former employee Jesús Sánchez. The parties stipulated at the hearing that Sánchez had waived such remedies by signing a settlement agreement with the Respondent. We thus modify the remedy, Order, and notice to indicate that Sánchez was discharged unlawfully on October 19 and that the Respondent's files are to be expunged of any reference to that unlawful discharge, but that Sánchez is not entitled to reinstatement or backpay.

The Respondent also demands a hearing or reopening of the proceedings to determine backpay amounts. We reject this demand. Backpay is calculated at the compliance stage of Board proceedings. See Board's Rules and Regulations Secs. 102.52; 102.55(a); Board's Statements of Procedure Sec. 101.16.

[5] They were the only warehouse employees absent that day.

proves that it would have discharged the employee even in the absence of protected conduct.

The judge found that the discharges of Muler and Cruz were part of the Respondent's unlawfully motivated response to the employees' attempt to discuss wage increases on October 19. He found that both men, to the Respondent's knowledge, had taken part in the demonstration outside the facility's gate. The judge noted that Rodríguez sent Muler the same discharge letter that he sent to the employees who were discharged on October 19 (stating that he had abandoned his work post), and that Rodríguez' letter to Cruz stated that he was being laid off in part because of a reorganization of the warehouse, which Rodríguez admitted was prompted by the employees' actions on October 19. The judge rejected as pretextual the Respondent's proffered reasons for its actions, i.e., that Cruz' discharge was motivated by economic considerations, that Muler had engaged in an "abusive pattern of absenteeism," and that Cruz demonstrated a "lack of discipline" by not reporting to work on October 19 as scheduled. The judge concluded that the Respondent had not shown that it would have discharged either man in the absence of his protected concerted activities.

In exceptions, the Respondent contends that, because Muler and Cruz were absent on October 19, they did not participate in any concerted activities or, if they did, the Respondent could not have known of any such participation before it discharged them. For the reasons that follow, we see no basis for rejecting the judge's finding of a violation.

To begin, even if the Respondent were correct either in asserting that Muler and Cruz did not participate in concerted activities or that it lacked knowledge of any such participation, the judge found—and we agree—that Muler's and Cruz' discharges were part of the larger unlawful termination of warehouse employees.[6] The Respondent's discharge on October 22 of every warehouse employee who had been absent when their coworkers were discharged one workday earlier strongly suggests that the Respondent, on October 22, was finishing the group discharge left uncompleted on October 19. In addition, Muler's discharge letter was identical to those received by the 17 employees discharged on October 19.

It has long been established that, when an employer embarks on a housecleaning mission to rid itself of employees who engaged in protected conduct, the General Counsel is not required to show that the employer had particular knowledge of each adversely affected employee's protected activities. Indeed, if the employer's housecleaning inadvertently leads to the discharge of employees who did not engage in such conduct at all, their discharges are nonetheless unlawful. See, e.g., *Majestic Molded Products v. NLRB*, 330 F.2d 603, 606 (2d Cir. 1964) (mass layoff to discourage protected conduct constitutes a violation "even if some white sheep suffer along with the black"). Thus, because Muler and Cruz were swept into the unlawful group discharge that began on October 19, proof of the Respondent's knowledge of their actual, individual conduct is not necessary for us to find their discharges unlawful as well.

Finally, for the reasons discussed in the judge's decision, we agree with the judge's rejection of the Respondent's asserted nondiscriminatory reasons for discharging Muler and Cruz.[7] The Respondent's asserted reliance on Cruz' alleged "lack of discipline" and Muler's alleged "abusive pattern of absenteeism" was clearly pretextual. Indeed, the Respondent's reasons for the discharges, as offered at trial, were different from those set forth in the employees' discharge letters. The pretextual nature of the Respondent's defense bolsters the judge's finding, which we adopt, that the Respondent unlawfully discharged all its warehouse employees because of that group's efforts to discuss wages and benefits. We therefore agree with the judge that the Respondent did not demonstrate that it would have discharged Muler and Cruz even in the absence of their protected conduct, and we affirm the judge's conclusions that they were unlawfully discharged because of their actual or suspected participation in the warehouse employees' protected concerted activity.

The Representation Election

A representation election was held on December 3 among the Respondent's chauffeurs, chauffeur helpers, and warehouse employees in its Caguas, Puerto Rico facility. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 3 for and 6 against the Union, with 17 challenged ballots, a number sufficient to affect the results of the election. Sixteen of the challenged ballots were those of employees discharged on October 19 and 22 and were challenged by the Board Agent because the voters' names did not appear on the eligibility list.[8]

[6] As we discuss below, the judge also implicitly found that Franco had been unlawfully discharged.

[7] Like the 17 employees unlawfully discharged on October 19, Muler had not missed 3 days of work without notice and therefore did not meet the Respondent's definition of "work abandonment."

[8] The 17th ballot was challenged by the Union on the basis of the voter's familial relationship with an officer of the Respondent. That challenged ballot is not at issue in these proceedings.

The judge overruled the challenges to all 16 ballots, on the ground that all 16 employees had been unlawfully discharged.[9] He rejected the Respondent's argument that voters Baltasar García and Héctor Franco had waived the right to have their ballots counted by settling their claims against the Respondent, and ordered that all 16 ballots be opened and counted. The Respondent excepts to the judge's conclusion that García and Franco did not waive the counting of their ballots. The Respondent also demands a hearing to consider whether the Union made an adequate showing of interest to support the representation petition. We reject both contentions.

1. The judge correctly concluded that Franco and García's settlement agreements did not effectively waive the right to have their ballots counted. First, only Franco and García, as individuals, and the Respondent are parties to these agreements; the Union was not a party to them and they do not purport to bind the Board. Second, although the agreements state that they settle Franco and García's claims as to both the unfair labor practice case and the representation case, they do not mention the ballots, even though the election had occurred over two months before the agreements were executed. Thus, the agreements do not clearly express Franco's and García's intent to waive their rights to have their ballots counted.

But even if the agreements expressly stated such an intent, we would not give effect to the provision. The judge correctly concluded that allowing challenged ballots to be redeemed in exchange for payment would violate public policy. Employees may freely choose whether or not to vote in a representation election; however, once they have voted, the ballots they cast are no longer within their control. We have rejected voters' postelection efforts to withdraw their ballots. *Great Eastern Color Lithographic Corp.*, 131 NLRB 1139 (1961). We do not allow parties or individuals to abuse our processes or to achieve a desired election outcome by pressuring voters to withdraw their ballots. Id. at 1140–1141. Moreover, the Union, as a party to the election, has an interest in the ballots and the integrity of the representation proceedings, and individual voters cannot waive the Union's rights.[10]

2. We decline the Respondent's demand for a hearing regarding the adequacy of the showing of interest supporting the Union's representation petition. Longstanding Board precedent establishes that the showing of interest is an administrative matter and is not litigable by the parties. *Gaylord Bag Co.*, 313 NLRB 306, 306–307 (1993); see also NLRB Casehanding Manual (Part Two) Representation Proceedings Secs. 11021; 11028.3; 11184. The purpose of the showing of interest "is to determine whether the conduct of an election serves a useful purpose under the statute—that is, whether there is sufficient employee interest to warrant the expenditure of time, effort, and funds to conduct an election." *Gaylord Bag*, supra at 307. Investigating the showing of interest after the election would consume additional Board resources, rather than conserving them. Thus, as the Board has stated, "after the election the adequacy of the showing of interest is irrelevant."[11] Id. We thus find no basis for reconsidering this matter.

For the foregoing reasons, we affirm the judge's order that the 16 challenged ballots cast by unlawfully discharged employees be opened and counted and that an appropriate certification be issued.

AMENDED CONCLUSIONS OF LAW

"3. By discharging on October 19 and 22, 2001, its employees Pedro Arzuaga, Luis R. Maysonet, Miguel Meléndez, Gerardo Rivera, Emiliano Santos, Ricardo Caez, Miguel Rosario, Jesús Sánchez, Eric Rodríguez,

[9] The 16 ballots included that of Héctor Franco. By this ruling, the judge implicitly found that Franco had been unlawfully discharged. Although no evidence was submitted regarding the circumstances of Franco's discharge, the Respondent has not excepted to the judge's overruling of the challenge to his ballot. We therefore adopt pro forma the judge's implicit finding that Franco was unlawfully discharged.

[10] We also agree with the General Counsel's contention that Franco's and García's ballots are analogous to the ballots of employees who quit their employment after the election. Such ballots do not retroactively lose their validity because of the employees' postelection action. *Personal Products Corp.*, 114 NLRB 959, 961 (1955); see also *Harold M. Pitman Co.*, 303 NLRB 655 (1991); *Saint-Gobain Industrial Ceramics v. NLRB*, 310 F.3d 778, 782 (D.C. Cir. 2002).

[11] Moreover, the Regional Director has already investigated, and found unsupported, the Respondent's allegation that the showing of interest was insufficient or was obtained by fraud. There is no new evidence of fraud that would justify revisiting that issue. As the Regional Director already concluded, the Respondent's discharged employees were alleged discriminatees, with a pending unfair labor practice charge regarding their discharges, when they signed Union authorization cards, and thus their cards were properly included in the count of proposed unit members showing an interest in representation. The Respondent's claim of new evidence that only a few employees signed authorization cards is apparently based on testimony regarding the number of employees who were at the Union hall signing cards *at a particular time* and disregards testimony that other employees signed authorization cards at other times.

Member Schaumber fully concurs with his colleagues and with Board law that "after the election the adequacy of the showing of interest is irrelevant." He remains perplexed, however, by the Board's precedent his colleagues cite that the showing of interest is purely an administrative matter and is not litigable by the parties. Sec. 9(c)(1) of the Act provides in pertinent part that the Board shall investigate a petition and may order an election "[w]henever a petition shall have been filed alleging that a substantial number of employees" desire union representation in collective bargaining. Since the statute establishes a substantiality test, he is unprepared to say that a party cannot contest the viability of a petition which does not, for one reason or another, meet this statutory standard.

Norberto Hernández, Mario Matos, Carlos Oyola, José (Miguel) Rivera, Edwin Ramos, Baltasar García, Carlos J. Rodríguez, Misael Rodríguez, Luis Muler, Eddiel Cruz, and Héctor Franco, and thereafter refusing to reinstate Pedro Arzuaga, Luis R. Maysonet, Miguel Meléndez, Gerardo Rivera, Ricardo Caez, Eric Rodríguez, Norberto Hernández, Mario Matos, Carlos Oyola, José (Miguel) Rivera, Carlos J. Rodríguez, Misael Rodríguez, Luis Muler, and Eddiel Cruz, because they engaged in protected concerted activities, the Company engaged in unfair labor practices in violation of Section 8(a)(1) of the Act."

ORDER

The National Labor Relations Board orders that the Respondent, City Stationery, Inc., Caguas, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, refusing to recall or otherwise discriminating against any employee for engaging in protected concerted or union activities.

(b) Telling its employees their reinstatement was held up because the Union filed a petition for election.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Pedro Arzuaga, Luis R. Maysonet, Miguel Meléndez, Gerardo Rivera, Ricardo Caez, Eric Rodríguez, Norberto Hernández, Mario Matos, Carlos Oyola, José (Miguel) Rivera, Carlos J. Rodríguez, Misael Rodríguez, Luis Muler and Eddiel Cruz full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make whole the employees listed in the preceding paragraph for any loss of earnings or other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order remove from its files any reference to the unlawful discharges of Pedro Arzuaga, Luis R. Maysonet, Miguel Meléndez, Gerardo Rivera, Emiliano Santos, Ricardo Caez, Miguel Rosario, Jesús Sánchez, Eric Rodríguez, Norberto Hernández, Mario Matos, Carlos Oyola, José (Miguel) Rivera, Edwin Ramos, Baltasar García, Carlos J. Rodríguez, Misael Rodríguez, Luis Muler, Eddiel Cruz, and Héctor Franco, and within 3 days thereafter, notify these employees in writing this has been done and that their discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Caguas, Puerto Rico, facilities copies of the attached notice marked "Appendix."[12] Copies of the notice, in English and Spanish, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, copies of the notice, in English and Spanish, to all current employees and former employees employed by the Respondent at any time since October 19, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS DIRECTED that the Regional Director for Region 24 shall, within 14 days from the date of this Decision and Order, open and count the ballots of Pedro Arzuaga, Luis R. Maysonet, Miguel Meléndez, Gerardo Rivera, Ricardo Caez, Eric Rodríguez, Norberto Hernández, Mario Matos, Carlos Oyola, José (Miguel) Rivera, Baltasar García, Carlos J. Rodríguez, Misael Rodríguez, Luis Muler, Eddiel Cruz, and Héctor Franco. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

Dated, Washington, D.C. September 30, 2003

Wilma B. Liebman, Member

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
Posted by the Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, refuse to recall, or otherwise discriminate against any of you for engaging in protected concerted and/or Union activities.

WE WILL NOT tell you that your reinstatement is being held up because a petition for a union election was filed.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the National Labor Relations Act.

WE WILL, within 14 days of the Board's Order, offer Pedro Arzuaga, Luis R. Maysonet, Miguel Meléndez, Gerardo Rivera, Ricardo Caez, Eric Rodríguez, Norberto Hernández, Mario Matos, Carlos Oyola, José (Miguel) Rivera, Carlos J. Rodríguez, Misael Rodríguez, Luis Muler and Eddiel Cruz reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make the employees listed in the preceding paragraph whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Pedro Arzuaga, Luis R. Maysonet, Miguel Meléndez, Gerardo Rivera, Emiliano Santos, Ricardo Caez, Miguel Rosario, Jesús Sánchez, Eric Rodríguez, Norberto Hernández, Mario Matos, Carlos Oyola, José (Miguel) Rivera, Edwin Ramos, Baltasar García, Carlos J. Rodríguez, Misael Rodríguez, Luis Muler, Eddiel Cruz, and Héctor Franco, and the refusal to reinstate Pedro Arzuaga, Luis R. Maysonet, Miguel Meléndez, Gerardo Rivera, Ricardo Caez, Eric Rodríguez, Norberto Hernández, Mario Matos, Carlos Oyola, José (Miguel) Rivera, Carlos J. Rodríguez, Misael Rodríguez, Luis Muler, and Eddiel Cruz,[1] and WE WILL, within 3 days thereafter, notify them in writing that their discharges will not be used against them in any way.

CITY STATIONERY, INC.

Miguel Nieves-Mojica, Esq., for the General Counsel.
Ilsa Y. Figueroa Arus, Esq., for the Company.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is an unfair labor practice prosecution alleging that City Stationery, Inc. (Company) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The prosecution was brought in the name of the General Counsel of the National Labor Relations Board (Board) by the Regional Director for Region 24, who issued a complaint and notice of hearing on December 21, 2001,[2] after investigating a charge filed on October 22, by Union de Tronquistas de Puerto Rico, Local 901, IBT, AFL–CIO (Union). Also on December 21, the Regional Director for Region 24 of the Board issued a "Report and Recommendation on Challenged Ballots, Notice of Hearing and Order Consolidating Cases," whereby the unfair labor practice case was consolidated with representation Case 24–RC–8213, for trial. I heard the trial of these consolidated cases in San Juan, Puerto Rico, on March 26 and 27, 2002,[3] where the Government and Company were represented by counsel, each of whom filed posttrial briefs, which I have studied.

Specifically it is alleged the Company on October 19, terminated the employment of the following employees: Pedro Ar-

[1] We need not reinstate or provide backpay to six employees who were found to have been unlawfully discharged. Emiliano Santos, Miguel Rosario, and Edwin Ramos have already been reinstated with backpay, and Jesús Sánchez, Baltasar García, and Héctor Franco have signed individual settlement agreements, by which they waived their rights to reinstatement and backpay.

[2] All dates are 2001 unless otherwise indicated.

[3] I opened these cases originally on January 23, 2002, in San Juan, Puerto Rico, and approved a full and complete settlement of the cases. Thereafter on March 4, 2002, counsel for the General Counsel filed a motion requesting to set aside settlement agreement and to request reopening of hearing. On March 7, 2002, I issued an order reopening the hearing which resulted in the trial on March 26 and 27, 2002.

zuaga, Luis R. Maysonet, Miguel Meléndez, Gerardo Rivera, Emiliano Santos, Ricardo Caez, Miguel Rosario, Jesús Sánchez, Eric Rodriguez, Norberto Hernández, Mario Matos, Carlos Oyola, José M. Rivera, Edwin Ramos, Baltazar García, Carlos J. Rodriguez, and Misael Rodriguez. It is also alleged the Company on October 22, terminated the employment of Luis Muler, Eddie L. Cruz, and Hector Franco. It is alleged the Company terminated all the above listed employees because they engaged in concerted activities and/or because the Company suspected they engaged in concerted activities and to discourage employees from engaging in these activities. It is alleged the Company's actions violate Section 8(a)(1) of the Act. Additionally, it is alleged that on/or about October 23, the Company failed and refused to reinstate its employees Norberto Hernández, Luis Maysonet, Eric Rodriguez, Miguel Rivera and Ricardo Caez, because they joined and/or assisted the Union and engaged in concerted activities and to discourage employees from engaging in such activities. It is alleged such conduct on the part of the Company violates Section 8(a)(1) and (3) of the Act. It is alleged the Company on/or about October 24, by an agent, informed employees that the reinstatement of certain employees to their former positions of employment was being held up because the Company had received a petition for a representation election filed by the Union seeking to represent the warehouse employees for the purposes of collective bargaining. It is also alleged that on/or about October 25, the Company, by an agent, in a telephone conversation informed an employee his reinstatement to his former position of employment was being held up because a petition for an election that had been filed by the Union with the Board. It is alleged these latter two actions by the Company violate Section 8(a)(1) of the Act.

With respect to the representation case the record reflects the Board conducted an election at the Company on December 3, among employees in an appropriate unit with approximately 23 eligible voters. Three votes were cast for the petitioner union, and six votes were cast against the participating labor organization. There were 17 challenged ballots. Sixteen of the 17 challenged ballots are those named as having been wrongfully discharged by the Company on either October 19, or 22.[4] A disposition of the unfair labor practice allegations will resolve the voting eligibility of those employees.

The Company admits that the Board's jurisdiction is properly invoked.[5] The Company admits President Pedro Rodriguez and Supervisor Wilma Rodriguez are its supervisors and agents within the meaning of Section 2(11) and (13) of the Act and that Attorney Hustin Gomez Triburcio is an agent of the Company within the meaning of Section 2(13) of the Act.

The Company denies the discharged employees engaged in protected concerted and/or union activities or that its actions violated Section 8(a)(1) and/or (3) of the Act. The Company contends the employees in question abandoned their jobs on October 19, and it discharged them for legitimate business considerations. The Company also urges it did not violated the Act in any failure to recall any of the employees.

In the particular circumstances described below, my ultimate judgment is that the Company violated the Act substantially as alleged in the complaint and I will further conclude the challenge ballots must be opened and counted.

FINDINGS OF FACT

A. An Overview

The Company is dedicated to the purchase and sale of office equipment and supplies to governmental and industrial entities. The Company is headquartered in Caguas, but also has facilities in Carolina and Hato Rey, Puerto Rico. Approximately 64 of the Company's 80 employees work at the Company's 75,000-square-foot office and warehouse headquarters facility in Caguas. The 55,000-square-foot warehouse portion of the facility is divided into two areas, namely, the materials area and the equipment area. It is in the equipment area of the warehouse where the chauffeurs or deliveries are put together and where approximately 95 percent of the warehouse employees work. It is the warehouse employees who are involved in the instant case.

B. The October 19 Meeting

A meeting of warehouse employees with Company President Rodriguez on October 19, and certain actions thereafter, constitute the focal points of this case.

Employee José Miguel Rivera Baez (Rivera) testified that a few days before October 19, he and a "group" of warehouse employees decided to seek a meeting with Company President Rodriguez to discuss, "some salary increases" and "some improved work benefits." Employee Luis Maysonet (Maysonet) testified the employees had some 30 days earlier preplanned their meeting with Company President Rodriguez. According to Rivera the "group" selected a spokesperson for their meeting. Rivera testified "the majority" of the warehouse employees knew ahead of time what was going to be discussed at the meeting. Employee Luis Antonio Muler Figueroa (Muler) testified "several" of his warehouse coworkers gathered at the "Naked Mare" (an entertainment club) on October 18, and talked about meeting with Company President Rodriguez the next morning to discuss "some benefits" that had been offered to the warehouse employees, but never given to them.

The warehouse employees met at the beginning of the work shift on October 19, at the warehouse to discuss their employment related concerns with Company President Rodriguez. Rivera testified the employees waited until 8:10 a.m. for Company President Rodriguez to arrive and at that time sent Carlos Oyola, their group leader, to find Rodriguez and tell him they

[4] Of those named as wrongfully discharged in the complaint I note that Emiliano Santos, Edwin Ramos, and Miguel Rosario voted unchallenged in the election and Jesús Sánchez did not vote. I further note Miguel Rosario was amended out of the challenged ballots list in the Regional Director's Report and Recommendation on Challenged Ballots.

[5] Specifically the Company admits and I find: (a) that it was timely served with copies of the Union's charge; (b) that it is a corporation with an office and place of business located in Caguas, Puerto Rico, where it is engaged in the retail sale of office furniture and supplies; (c) that annually it purchases and receives at its place of business in Caguas, Puerto Rico, goods and materials valued in excess of $50,000, directly from points located outside the commonwealth of Puerto Rico; and, therefore, (d) that it is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. It is admitted and I find that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

wanted to meet with him. Company President Rodriguez met with the employees at approximately 8:15 a.m. Rivera testified that Baltazar Garcia and he spoke on behalf of the employees. Employee Maysonet testified Garcia started the meeting by asking Company President Rodriguez, "What he was going to do . . . in terms of the salary . . . increase." Rivera testified they asked about the salary increase the warehouse employees had been promised by Rodriguez in November 2000. According to Rivera, Company President Rodriguez responded by asking the employees if they had read the newspapers or watched television so as to understand how bad the economic situation was in Puerto Rico. Rivera told Company President Rodriguez if he, Rodriguez, thought the economic situation was bad in Puerto Rico to put "himself in our situation where we are making $170 or $180 a week" Rivera testified, "Well, Mr. Rodriguez was upset, and he told us that those of us that did not want to work could go home."

C. Company President Rodriguez' Response

Company President Rodriguez testified he arrived at the Company at approximate 8 a.m. on October 19, and greeted some of the warehouse employees upon his arrival. He said almost all of the warehouse employees were present that morning. Rodriguez recalled that around 8:10 a.m. employee Oyola told him, "The guys from the warehouse wanted to speak with [him]." Rodriguez met with the warehouse employees and asked what was going on. According to Rodriguez, employee Rivera mentioned a bonus they had talked about in November of the previous year. Rodriguez told Rivera that at the end of the year he would take a look at the situation and "that if they would please start to work that there was a lot of work to be done." Rodriguez said he told the warehouse employees he was not comfortable with the economic situation in Puerto Rico at that time. Rodriguez testified that in addition to the regularly scheduled work for October 19, there was an inspection to be performed by an inspector from the Puerto Rico Treasury Department on a container of merchandise, which required the assistance of the warehouse employees in carrying out the inspection. Company President Rodriguez said he told the employees to please return to work but if they were not going to do so to abandon the facilities because there were some people who wanted to work.

D. Outside the Gate

Employee Rivera testified the employees thereafter moved to the parking area and waited to see if Company President Rodriguez would communicate further with them. According to Rivera, approximately 20 minutes thereafter Rodriguez again spoke with the warehouse employees and instructed that they leave the parking area and go outside the Company's facilities. Rivera said the employees then moved, as a group, outside the front gate area of the facilities.[6]

Rivera testified Company Attorney Gomez, "showed up" where the warehouse employees were just outside the gate later that morning (October 19) and told them Company President Rodriguez was "a little bit upset" and asked if the employees would give him (Gomez) an opportunity to speak with Rodriguez to see what he could mediate between Rodriguez and the employees.

Rivera testified thereafter Company Supervisor Wilma Rodriguez[7] showed up outside the gate to speak with the employees about what had happened that morning but that Company President Rodriguez came and "grabbed her [Wilma] by an arm, and he took her away in a not so very nice manner, and he told her that she had nothing to say to us."

E. Company President Rodriguez' Actions

Company President Rodriguez testified that after the warehouse employees left or abandoned their worksites, he "understood that they had no interest in working that they did not want to work and that they had violated the Company's regulations [and] . . . [he then] . . . proceeded to dismiss them." Rodriguez said he had always treated his employees well that even when times were "very, very, very bad] . . . [he]] . . . never laid any one of them off] . . . and] . . . he paid them well." Rodriguez said he could not understand why the employees would refuse to work for him. He said he prepared dismissal letters for the warehouse employees at around 11 a.m. on October 19, and thereafter mailed them to the employees. The letters signed by Company President Rodriguez and mailed to the employees dismissed that morning are as follows:[8]

> [Employee's Name] effective today, October 19, 2001, you are hereby discharged from your employment at City Stationery, Inc. The reason for having reached this decision is that you abandoned your work post without authorization, which constitutes a serious fault to your duties as an employee of City Stationery, Inc.
>
> The final payment for vacations or any other accrued benefit, will be paid the next payroll date. You may come by to pickup your check, if you fail to do so, it will be sent by mail to the address appearing in your employment record. Without anything further from this matter, I remain.
>
> Yours truly,
>
> Pedro Rodriguez
> President

Company President Rodriguez testified three of the employees discharged on October 19, namely Edwin Ramos, Emiliano Santos, and Miguel Rosario, recognized they abandoned their jobs, asked for another chance to work for the Company and he granted their request. Company President Rodriguez testified he offered reemployment only to those who demonstrated to

[6] Rivera testified those present that morning for the meeting and that moved outside the front gate area and thereafter remained were Pedro Arzuaga, Luis R. Maysonet, Miguel Meléndez, Gerardo Rivera, Emiliano Santos, Ricardo Caez, Miguel Rosario, Jesús Sánchez, Eric Rodriguez, Norberto Hernández, Mario Matos, Carlos Oyola, José M. Rivera, Edwin Ramos, Baltazar García, Carlos J. Rodriguez, and Misael Rodriguez.

[7] Wilma Rodriguez is Company President Rodriguez' daughter and serves as the Company's traffic manager.

[8] The 17 employees dismissed that morning were the same individuals as set forth in fn. 5.

him they knew and understood what they did on October 19 was wrong.

F. Employees Sign Union Cards

Employee Rivera testified he received his letter of dismissal on Saturday, October 20, and later that afternoon he and coworkers Mario Matos and Miguel Rosario, went to the Union's hall in San Juan, where they signed cards for the Union. Employee Luis Muler testified he also signed a card for the Union at the Union's hall on Saturday, October 20.

G. The Events of October 22

According to employee Rivera all 17 of the warehouse employees who were at the Company's front gate on Friday, October 19, returned to the gate on Monday, October 22, along with 3 additional coworkers, Luis Muler, Eddiel Cruz, and Hector Franco.[9] Employee Muler testified Company President Rodriguez came to the front gate on October 22, where the employees had gathered and looked directly at him. Employee Rivera said a company vehicle had knocked the gate down where they were at and that Company President Rodriguez assisted two employees repair the gate. Rivera stated Company President Rodriguez was "fixedly" looking at the employees at the gate.

Also on Monday, October 22, Company Attorney Gomez, came to where the warehouse employees were assembled at the gate and told them Company President Rodriguez wanted to speak with some of them. Thereafter employees Edwin Ramos, Carlos Oyola, and Rivera, as well as Company Attorney Gomez met with Rodriguez inside the facilities. According to Rivera, Company President Rodriguez told them "he was working the business through some loans and then the was going to reorganize the warehouse" and added "he was going to say who the people who were going to be in that reorganization." Company Attorney Gomez then told the three warehouse employees he was going to prepare a list for Company President Rodriguez of the employees who would be coming back to work for the Company. Rivera and the two other employees returned to the other assembled employees at the front gate.

H. Company President Rodriguez' Account of October 22

Company President Rodriguez acknowledged meeting with three warehouse employees along with Company Attorney Gomez on October 22. Rodriguez said he was unaware of any organizational activities by the warehouse employees and was not aware of any unfair labor practice charges or representation petitions being filed at the time he met with the three warehouse employees. Rodriguez said he told the employees he had to reorganize the warehouse. Company President Rodriguez explained he had to reorganize "because [he] no longer counted with [the employees]." Rodriguez further explained that the employees had refused to work on October 19, and he had to organize the warehouse in a way that it would function. Rodriguez told the employees once he had completed the reorganization and placed the pieces where they needed to be he would then decide who to recall to work. Company President Rodriguez said he explained he would decide specifically which employees would be recalled by examining the needs of the Company, along with the employees' needs and seniority.

I. The Three Discharged After October 19

1. Eddiel Cruz

Warehouse employees Muler, Cruz, and Franco, were absent from work and did not participate in the activities of their coworkers on October 19. On Monday, October 22, Cruz reported for work but could not find his timecard to clock in. Cruz went to Company President Rodriguez' office to find out about his missing timecard. Rodriguez told Cruz he was reorganizing the warehouse and preparing a list of employees to be recalled upon completion of the reorganization. Rodriguez asked Cruz for his and coworker Franco's home telephone numbers. Cruz said he asked Company President Rodriguez for a letter on his work status for unemployment purposes. Rodriguez told Cruz the Company would mail him one which Cruz received on October 25. Rodriguez' letter follows:

> October 22, 2001
>
> Dear Mr. Eddiel Cruz:
>
> Mr. Eddiel Cruz, effective today, October 22, you are hereby laid-off as an employee from the City Stationery, Inc. Company. The reason why we have taken the decision is due to economic reasons, in addition, a reorganization of the work area will be carried out.
>
> The payment in full for accrued vacations will be paid the next payroll day, the same will be sent by mail to the address appearing in your record. Without anything further on this matter.
>
> Yours Truly,
>
> Pedro Rodriguez
> President

Employee Cruz left Rodriguez' office and joined his coworkers at the gate telling them what had taken place in Rodriguez' office. Cruz testified he also joined his coworkers at the front gate at the Company on Tuesday, October 23 and Wednesday, October 24. Cruz said the employees carried placards addressing the benefits they wanted from Rodriguez.

Cruz acknowledged he was given a 30-day suspension prior to the events of October 19. Cruz explained he was given the suspension for having clocked in the timecard of a coworker. Cruz also acknowledged he was scheduled to return to work from that suspension on October 19, but did not report for work until October 22.

2. Company President Rodriguez responds

Company President Rodriguez testified Cruz was to have but did not report for work on October 19. Rodriguez acknowledged giving Cruz a layoff letter but stated the letter did not reflect the real reason for Cruz' termination. Rodriguez explained the "real reason was for lack of discipline, for not hav-

[9] Muler testified he reported back problems to the Company on Friday, October 19. Cruz testified he had been suspended for 30 days from the Company for a timecard infraction and was to have returned to work on October 19, but did not report on that date.

ing reported to work on Friday [October 19] as he was supposed to have." Rodriguez gave Cruz the "wrong reasons letter" in order to enable him to draw unemployment compensation. Rodriguez said the economy in general, was slow in October, and that he borrowed $2 million to keep the Company operating because accounts receivable were slow coming in.

With regard to the Company's reorganization Rodriguez testified; "I decided to reorganize [the warehouse] when this group of the employees disobeyed . . . orders and [decided] not to return to work."[10]

3. Luis Muler

Employee Muler testified he commenced working for the Company in September 2000, and worked until October. Muler said he did not report for work on October 19, because of back problems. Muler said he reported his health-related reasons for being absent to the Company by telephone on October 19.[11] Muler reported for work on Monday, October 22, but the gates were closed. Some coworkers told Muler the Company's attorney was going to speak with them. Muler testified the Company's attorney appeared and told the employees Company President Rodriguez was not happy with the situation. A short time later Company President Rodriguez showed up at the gate where the employees were and, according to Muler, Rodriguez and his attorney looked at him but said nothing. Muler was given a discharge letter dated October 22. His dismissal letter was identical to the those given to the employees dismissed on October 19.

4. Company President Rodriguez responds

Company President Rodriguez testified Muler had an attendance problem and was often absent the day after being paid. Rodriguez said Muler did not report for work on October 19 or 22, and failed to provide an excuse for either absence. Rodriguez, on cross-examination, stated he did not discharge Muler for the number of days he was absent but rather for "the abusive pattern of absenteeism that he had."

5. Hector Franco

Hector Franco is also alleged to have been unlawfully discharged on October 22; however, he waived reemployment with the Company and the Government no longer seeks any remedy with respect to his discharge.

J. The Charge and Petition

On October 22, the Union filed the underlying charge in the instant unfair labor practice case and the underlying representation petition that gives rise to the challenged ballots here.

K. Events of October 23 through October 26

Muler testified he and his coworkers picketed at the Company's front gate on Tuesday, October 23, through Friday, October 26. Muler said they carried picket signs that read; "Better Working Conditions" and "Better Salaries."

Rivera testified that around 1 p.m. on Wednesday, October 24, while they were picketing at the gate Company Attorney Gomez approached and gave him a list of employees that were to return to work on Thursday, October 25. Rivera said the list was in Company President Rodriguez' handwriting which he based on 14 years of observing Rodriguez' handwriting. The list,[12] reflected the nicknames for employees Norberto Hernandez, Luis Maysonet, Eric Rodriguez, Ricardo Caez, Jorge Perez, Edwin Ramos**,** and Rivera. Rivera showed the return-to-work list to his coworkers and went home for the day. Rivera received a telephone call at home around 5:30 p.m. from Company Attorney Gomez. According to Rivera's uncontradicted testimony, Gomez told him those on the return-to-work list given him earlier could not do so, "because they had found out that the Union was in the mist of it and that we were getting organized. And we could not be there until that problem had been resolved."

Rivera was not thereafter contacted about he or the others returning to work.

Maysonet testified coworker Norberto Hernandez came to his home on October 24, and told him the Company wanted to reinstate Maysonet the next day, Thursday, October 25. Maysonet reported for work on that day and as he headed toward the time clock Company President Rodriguez told him he could not report for work until further notice.[13] Maysonet was never given any further notice.

L .Company President Rodriguez' Account of the Late October Events

Company President Rodriguez testified the first document he received from the Board was the election petition in Case 24–RC–8213 which was filed by the Union on October 22, and received by the Company via fax on October 23. Rodriguez said he did not see the petition until the next morning, October 24. Rodriguez said the Company received the October 22 unfair labor practice charge "around" Thursday, October 25, or Friday, October 26.

Company President Rodriguez testified he did not remember telling employees they were not going to be recalled or rehired because charges had been filed with the Board or that some charge against the Company was pending before the Board. Rodriguez does; however, acknowledge the following is set forth in his pretrial affidavit given to the Board on November 13:

> The possibility of recalling the employees who were discharged was being considered, but it will not be done until this impasse is resolved. When I say until this impasse is resolved I refer until the grievance before the Board is resolved. I refer as a grievance to the charge be-

[10] Rodriguez further explained his position by asking counsel, "What would you do if you were on a boat and people who were on the boat jumped ship; would you let the boat sink?"

[11] As noted earlier Muler testified that on October 18, he and other coworkers met at the "Naked Mare" and discussed meeting with Company President Rodriguez the next day. Muler said the employees wanted to talk with Rodriguez about "some benefits that he had offered us . . . that he never gave us." Muler also went with certain coworkers to the Union's hall on Saturday, October 20, and signed a union card. Union officials told Muler and others they would be at the Company on Monday, October 22.

[12] The list was received in evidence.

[13] Company President Rodriguez acknowledged he told employee Maysonet on October 25, he could not return to work until further notice.

> cause of the firing. In addition to this, it also depends on the need arising at the Company.
>
> . . . .
>
> This meeting was held at the Company showroom. Present were Attorney Augustin Gomez, Mr. Mario Matos, Mr. Angel Gonzalez, Mr. Miguel Rivera, and I. I do not remember if any other person was present in the meeting. During that meeting, the possibility of employing them again was discussed, but since they had received the petition for elections, I told them that I had first to resolve that matter and I would then let them know. I believe that the first thing I received was the petition for elections. I received the charge for the dismissal afterwards. Nothing else was discussed during that meeting.

Company President Rodriguez explained that what is set forth in his pretrial Board affidavit was possibly "misinterpreted" by the Board agent that "what I meant to say to her was that I was going to recruit them once I had reorganized the warehouse and reorganized all the work area so that in that way be able to call the ones that I needed."

Near the conclusion of his trial testimony Company President Rodriguez stated that in considering whether to reinstate any of the discharged employees he looked at the amount of time they had been employed by the Company, the employees' age, and the Company's needs. Rodriguez added he did not recall those discharged on October 19, because he understood he could not do so until the unfair labor practice charge and the election petition pending before the Board had been decided by the Board.

II. DISCUSSION, ANALYSIS, AND CONCLUSIONS

A. Legal Principles

A key or central issue here concerns whether the actions of the warehouse employees on October 19, constituted concerted activities protected by the Act.

The concept of concerted action has its basis in Section 7 of the Act. Section 7 in pertinent part states:

> Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities* for the purpose of collective bargaining or other mutual aid or protection. . . . [Emphasis added.]

Section 7 of the Act does not use the term "protect concerted activities" but only "concerted activities." The statue requires that activities under consideration be "concerted" before they can be "protected." *Bethany Medical Center*, 328 NLRB 1094, 1101 (1999). The Board in *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), set forth the following definition of concerted activities:[14]

> In general, to find an employee's activity to be "concerted" we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g. discharge) was motivated by the employee's protected concerted activity. [Footnotes omitted]

It is clear the Act protects discussions between two or more employees concerning terms and conditions of employment. Nothing is more basic "terms and conditions" of employment than wages. Higher wages is a frequent objective of group activity. Discussions about wages are necessary to further such a goal. Discussions by employees about wages are protected. *Trayco of S.C.*, 297 NLRB 630, 634 (1990). Stated differently, "dissatisfaction due to low wages is the grist on which concerted activity feeds." *Whittaker Corp.*, 289 NLRB 933, 934 (1988), citing *Jeannette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976). In a group-meeting context, a concerted objective may be inferred from the circumstances. *Whittaker Corp.*, supra.

B. The Concerted Activity

Applying the principles outlined above it is clear and I find the warehouse employees acted concertedly when they, as a group, met with Company President Rodriguez on October 19. The employees preplanned the meeting deciding in advance what they would discuss with the company president, namely salary increases and improved worker benefits. The employees, who met as a group, selected two employees to act as their spokespersons. Employees Garcia and Rivera, as the group's spokespersons, specifically asked Rodriguez about salary increases. It is also clear and I find Company President Rodriguez knew the employees were acting in concert. He acknowledged an employee [Oyola] came to him on the morning of October 19, and told him "the group from the warehouse [wants] to speak with [you]." Rodriguez spoke with them about wages and attempted to persuade the employees it was hard economic times and they should wait until he could look at their wage concerns at the end of the year. All the warehouse employees were present at the October 19 meeting except perhaps three. The employees' action on October 19 was expressly and inferentially concerted.

C. Company Knowledge of Concerted Activity

It is beyond question and I find the Company knew of the concerted nature of its employees activities. As just noted, Company President Rodriguez was requested to meet with the warehouse employees, which he in fact did, and discussed wage concerns with them. Company Traffic Manager Wilma Rodriguez talked with the employees, albeit briefly before her father removed her from the area, about their wage concerns. Company attorney Gomez knew of the concerted nature of the employees activities and even attempted to "mediate" between the employees and Company President Rodriguez.

[14] In *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), the Board held that under certain circumstances a single employee could engage in concerted activity within the meaning of Sec. 7 of the Act.

D. Concerted Protected Activities

Not only were the employees activities concerted, and known by the Company to be concerted, the activities were protected by the Act. Discussions by employees with their employer about wages are protected.

E. The Discharge of the Warehouse Employees

The Company's discharge of its warehouse employees on October 19 violated the Act. I note the employees engaged in concerted activity protected by the Act at approximately 8 a.m. on October 19, and Company President Rodriguez discharged them at approximately 11 a.m. that same morning. In his dismissal letter to the warehouse employees Company President Rodriguez indicated; "[t]he reason for having reached this decision [to discharge the employees] is that you abandoned your work post without authorization." I, however, find Company President Rodriguez ordered the warehouse employees out of the company facilities on October 19, when they sought to further discuss wage concerns with him. However, even if I concluded the employees walked out to protest his failure to talk further about their wage concerns the end result would be the same. Employees, such as those here, may lawfully engage in a walkout to protest terms and conditions of their employment. I specifically reject the Company's contention the employees abandoned their jobs in violation of the Company's rules and thus the employees were lawfully discharged. I also reject the Company's contention it was going through economic hard times to justified its actions. Company President Rodriguez testified, in response to one of his own counsel's questions, that he terminated the warehouse employees on October 19, because they violated his rules and "refused to work." I find the Company would not have discharged the warehouse employees but for their concerted protected activities.

F. The October 19 Discharges Violated the Act

In summary on this point, I find the warehouse employees engaged in concerted activity on October 19, that was protected by Section 7 of the Act and the Company violated Section 8(a)(1) of the Act by discharging the warehouse employees for their participation in protected concerted activities.[15]

G. Discharge of Muler

I credit employee Muler's testimony he did not report for work on Friday, October 19, because of health problems related to his back, and that he reported his health problems to the Company on that date. Muler however knew the warehouse employees were going to attempt to meet with Company President Rodriguez on October 19, because Muler and certain coworkers had discussed such a meeting the night before at a local club. Muler knew the warehouse employees wanted to specifically discuss with Rodriguez benefits he had promised but never gave to the employees. Muler reported for work on Monday, October 22, but according to his testimony, which I credit, the gates to the Company were closed. Muler joined his fellow workers outside the front gate and was observed there by Company Attorney Gomez and Company President Rodriguez. Muler's dismissal letter from Company President Rodriguez was dated October 22, however, it was identical to the letters given the warehouse employees terminated on October 19.

The Government established Muler engaged in concerted activity protected by the Act by showing Muler joined his coworkers outside the front gate on the day he was discharged. Muler's coworkers were picketing for better wages and working conditions. Company President Rodriguez and attorney Gomez saw Muler at the Company gate. The reasons given Muler for his discharge were the same reasons, found to be unlawful, that were given to the warehouse employees terminated by the Company on October 19. Muler's dismissal was just one part of Company President Rodriguez' larger layoff of the warehouse employees because of their attempts to discuss wage and benefit concerns with him. It is also noted Company Attorney Gomez told the warehouse employees Company President Rodriguez was unhappy with their concerted activities. I am persuaded the Government has established Rodriguez' unhappiness carried over to include Muler as well.

I find the Company failed to demonstrate it would have taken the action it did even if Muler had not joined his fellow-workers at the gate on October 22. I reject, as unworthy of reliance, Rodriguez' contention he discharged Muler as a result of an "abusive pattern of absenteeism." Even assuming Muler had an attendance problem it would appear nothing came of it until the warehouse employees engaged in concerted protected activities which made Rodriguez "unhappy." Muler's October 19 absence was reported by Muler to the Company and his absence on October 22, was to join his coworkers picketing at the Company gate.

I find the Company violated Section 8(a)(1) of the Act when, an October 22, it discharged its employee Luis Muler.

H. Discharge of Cruz

Employee Cruz did not report for work on Friday, October 19, which was the date his 30-day suspension for a prior company rule infraction had been satisfied. Cruz attempted to clock in for work on Monday, October 22, however, his timecard was missing. Company President Rodriguez told Cruz he was reorganizing the warehouse and preparing a list of employees to be recalled upon completion of the reorganization. Rodriguez asked Cruz for his and fellow employee Franco's home telephone numbers in order to contact them about recall. Cruz then left the warehouse and joined his coworkers at the front gate where they carried placards addressing their concerns with the Company. Employees Rivera and Muler testified Company President Rodriguez observed the employees' activity at the gate.

The evidence establishes Cruz engaged in concerted protected activity of which the Company was aware. It is, as set forth elsewhere in this decision, quite clear Company President Rodriguez was "upset" with the employees concerted activities. Company President Rodriguez laid off employee Cruz on October 22. Cruz' layoff letter stated in part, "The reason why we have taken the decision is due to economic reasons, in addition, a reorganization of the work area will be carried out." I find the Government established a prima facie case regarding Cruz' termination. Cruz' layoff, albeit 1 workday later than others,

[15] The names of those wrongfully discharged are set forth in fn. 5 of this decision.

was part of the Company's overall layoff of the warehouse employees on October 19.

I find the Company failed to demonstrate Cruz' layoff would have taken place even in the absence of his and coworkers concerted protected activities. Company President Rodriguez even acknowledged that the reasons set forth in Cruz' termination letter were inaccurate but asserted he provided such inaccurate information to enable Cruz to draw unemployment compensation. Rodriguez testified the real reason for Cruz' discharge "was for a lack of discipline" resulting from his not reporting for work on Friday, October 19. I reject Rodriguez' assertions. First, there is no credible evidence Cruz was ever told his layoff was as a result of his failing to report for work on the previous Friday. Second, Rodriguez admits part of the reason for Cruz' layoff was the reorganization of the warehouse. However, Rodriguez acknowledged he only decided to reorganize the warehouse after, and as a direct result of, the employees concerted protected activities. Thus, the Company may not validly rely on its reorganization to in any manner justify its layoff of Cruz.

I am persuaded and find the Company terminated Cruz because he, along with other warehouse employees, engaged in concerted protected activities and his termination violated Section 8(a)(1) of the Act.

I. Return-to-Work Plans

It is undisputed Company President Rodriguez along with Attorney Gomez met with three of the warehouse employees Rivera, Ramos, and Oyala on Monday, October 22. At the meeting Rodriguez explained he was reorganizing the warehouse. Rodriquez told the three employees that when the reorganization was completed he would decide who to recall for work. Attorney Gomez told the employees he would prepare a list of employees to be recalled.

Rivera credibly testified that at 1 p.m. on Wednesday, October 25, Attorney Gomez brought him at the front gate a list of employees that were to return to work the next day. Rivera further credibly testified Attorney Gomez telephoned him at home around 5:30 p.m. that same day and told him those on the list could not return to work the next day because the Company had learned the Union was involved and the employees were attempting to get organized. Gomez added the employees could not return to work until that problem was resolved.

Employee Maysonet was told on October 24, by employee Hernandez, that he was to report for work on October 25. It is undisputed Maysonet reported for work on that date but was told, on his way to the time clock, by Company President Rodriguez not to report for work until further notice.

Rodriguez could not recall telling employees they were not to be recalled or rehired because a charge or petition had been filed with the Board. Rodriguez acknowledged stating in his pre-trial Board affidavit he had considered recalling the employees but decided not to until the matter before the Board was resolved. Rodriguez explained in his pretrial Board affidavit; "the possibility of employing them again was discussed but since [the Company] had received the petition for election, I told them that I had to resolve that matter and I would then let them know."

I find the Company notified certain employees on October 24, to return for work but on October 25, refused to reinstate them because it learned a union was involved filing an election petition and an unfair labor practice charge. It is clear, and I find, the Company had plans to recall or rehire certain of its employees who were qualified for positions that were vacant but it did not do so for unlawfully motivated reasons and its actions violate Section 8(a)(3) and (1) of the Act. I reject, as unworthy of belief, Company President Rodriguez' testimony that he was simply misinterpreted by the Board's agent in his pretrial Board affidavit. I likewise reject the Company's asserted defense that Rodriguez held an honest belief that he could not recall the employees until the actions before the Board were resolved. Rodriguez had legal counsel throughout these actions.

In summary, I find the Company's failure to recall its employees Norbeto Hernandez, Luis Maysonet, Eric Rodriguez, Miguel Rivera, and Ricardo Cruz on or about October 25, was because the employees joined or assisted the Union and to discourage employees from engaging in these activities and as such violated Section 8(a)(3) and (1) of the Act.[16]

III. REPRESENTATION CASE

A. Background

Pursuant to a Stipulated Election Agreement approved by the Acting Regional Director for Region 24 on November 1, a secret ballot election was conducted on December 3 among the employees in the following appropriate collective-bargaining unit:

> All chauffeurs, chauffeurs helpers, and warehouse employees employed by the Company at its place of business located in Caguas, Puerto Rico, excluding all other employees, guards and supervisors as defined in the Act.

The tally of ballots indicated three votes were cast for the Union while six votes were cast against representation by the Union. Seventeen determinative challenges were consolidated for hearing with this unfair labor practice proceeding. Sixteen of the 17 challenged ballots are those named in the complaint as having been wrongfully discharged by the Company on either October 19 or 22. The challenged ballot of Miguel Rosario was withdrawn in as much as it was established Rosario voted unchallenged in the December 3 election.

B. Resolution of Determinative Challenged Ballots

Sixteen challenged ballots were challenged by the Board because the voters names did not appear on the voter eligibility list.

[16] Additionally, I find Company Attorney Gomez' statement, to Rivera that certain employees could not return to work because the Union was involved was coercive and independently violates Sec. 8(a)(1) of the Act. I likewise find that Company President Rodriguez' statement, as contained in his pretrial affidavit, that the possibility of reemploying the warehouse employees was actively considered, but he told the employees it could not take place until after the petition for an election had been resolved was coercive and independently violated Sec. 8(a)(1) of the Act. *TPA, Inc.*, 337 NLRB No. 40, slip op. at. 2 (2001).

In as much as I have concluded that 16 of the challenged ballots were the 16 employees wrongfully discharged by the Company, I shall overrule the Board's challenge to those ballots. *Ms. Desserts, Inc.*, 299 NLRB 236, 237 fn. 8 (1990). Included in these 16 challenged ballots are the ballots of employees Baltazar Garcia and Hector Franco who waived their right to reinstatement with the Company for compensation. The two signed broad waivers which the Company argues should waive the right to have their ballots opened and counted. I reject the Company's contention. Challenged ballots may not be redeemed by the payment of money because such would be against public policy.

CONCLUSIONS OF LAW

1 .City Stationery, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Union de Tronquistas de Puerto Rico, Local 901, IBT, AFL–CIO is a labor organization with the meaning of Section 2(5) of the Act.

3. By discharging on October 19 and 22, 2001, its employees Pedro Arzuaga, Luis R. Maysonet, Miguel Meléndez, Gerardo Rivera, Emiliano Santos, Ricardo Caez, Miguel Rosario, Jesús Sánchez, Eric Rodriguez, Norberto Hernández, Mario Matos, Carlos Oyola, José M. Rivera, Edwin Ramos, Baltazar García, Carlos J. Rodriguez, and Misael Rodriguez, and thereafter refusing to reinstate all of them except Emiliano Santos, Edwin Ramos, Miguel Rosario, Baltazar García, and Hector Franco, because they engaged in protected concerted activities, the Company engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. By failing and refusing since on or about October 25, 2001, to reinstate its employees Norberto Hernández, Luis R. Maysonet, Eric Rodriguez, Miguel Rivera, and Ricardo Caez because they joined and/or assisted the Union and to discourage employees from engaging in these activities, the Company violated Section 8(a)(3) of the Act.

5. By telling its employees reinstatement to their jobs was being held up because an election petition was filed the Company violated Section 8(a)(1) of the Act.

6. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

It having been found the Company has engaged in certain unfair labor practices, I recommend it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

It is recommended the Company be required, within 14 days from the date of this Order, to offer Pedro Arzuaga, Luis R. Maysonet, Miguel Meléndez, Gerardo Rivera, Ricardo Caez, Jesús Sánchez, Eric Rodriguez, Norberto Hernández, Mario Matos, Carlos Oyola, José M. Rivera, Carlos J. Rodriguez, Misael Rodriguez, Luis Muler, and Eddiel Cruz reinstatement to their jobs, or if their former jobs no longer exist to substantially equivalent positions, without prejudice to their seniority, or other rights or privileges previously enjoyed, and make them whole for any loss of earnings or other benefits suffered as a result of the discrimination against them with interest. Unemployment compensation shall not be considered interim earnings. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I also recommend the Company be ordered, within 14 days from the date of this Order, to remove from the files of the above-listed employees any reference to their unlawful discharge, and within 3 days thereafter, notify them in writing this has been done and that their discharge will not be used against them in any manner. I also recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate notice to employees,[17] copies of which are attached hereto as an "Appendix" for a period of 60 days in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices. The Government does not seek nor do I recommend any remedy with respect to employees Emiliano Santos, Edwin Ramos, and Miguel Rosario who have already been reinstated and Baltazar Garcia and Hector Franco who reached a settlement with the Company whereby they were compensated and waived their right to be re-employed by the Company.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Company, City Stationery, Inc., its officers, agents, successors, and assign,s shall

1. Cease and desist from

(a) Discharging, refusing to recall or otherwise discriminating against employees, because they engage in protected concerted or union activities.

(b) Telling its employees their reinstatement was held up because the Union filed a petition for election.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2 Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the date of this Order offer Pedro Arzuaga, Luis R. Maysonet, Miguel Meléndez, Gerardo Rivera, Ricardo Caez, Jesús Sánchez, Eric Rodriguez, Norberto Hernández, Mario Matos, Carlos Oyola, José M. Rivera, Carlos J. Rodriguez, Misael Rodriguez, Luis Muler, and Eddiel Cruz reinstatement to their former jobs or if their former jobs no longer exist to substantially equivalent positions without prejudice to their seniority or other rights or privileges.

(b) Within 14 days of this Order remove from its files any reference to their unlawful discharge, and within 3 days thereafter, notify each of those, listed above, in writing this has been done and that their discharge will not be used against them in any manner.

---

[17] The notices shall be in English and Spanish.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, time cards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Regional Director of Region 24 of the National Labor Relations Board, post at its Caguas, Puerto Rico facility copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Company's authorized representative, shall be posted by the Company upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to employees, to all employees employed at any time since October 19, 2001.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

Representation Case—Challenged Ballots

It is recommended the ballots of the following individuals be opened and counted: Pedro Arzuaza, Norberto Hernández, Luis R. Maysonet, Mario Matos, Miguel Meléndez, Carlos Oyola, Gerardo Rivera, José M. Rivera, Ricardo Caez, Baltazar Garcia, Carlos J. Rodriguez, Misael Rodriguez, Eric Rodriguez, Eddiel Cruz, Hector Franco, and Luis Muler. The appropriate certification, based upon the revised tally of ballots, will be issued thereafter.

Dated at Washington, D.C. June 17, 2002

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against our employees because they engage in protected concerted and/or union activities.

WE WILL NOT tell our employees their reinstatement is being held up because a petition for an election was filed.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of this Order, offer Pedro Arzuaga, Luis R. Maysonet, Miguel Melendez, Gerardo Rivera, Ricardo Caez, Jesús Sánchez, Eric Rodriguez, Norberto Hernández, Mario Matos, Carlos Oyola, José M. Rivera, Carlos J. Rodriguez, Misael Rodriguez, Luis Muler, and Eddiel Cruz reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL make the above-listed employees whole for any loss of earnings and other benefits suffered as a result of the action against them, with interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the discharge of the above listed employees, and WE WILL, within 3 days thereafter, notify them in writing that their discharge will not be used against them in any way.

CITY STATIONERY, INC.